In the Supreme Court of the United States

OCTOBER TERM, 1942

NOS. 34, 35, 36

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, DEBTOR, PETITIONER

v.

MUTUAL SAVINGS BANK GROUP COMMITTEE ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY OF RECONSTRUCTION FINANCE CORPORATION TO MOTION OF PETITIONER TO SUPPLEMENT RECORD

Reconstruction Finance Corporation, a public corporation created by Act of Congress (47 Stat. 5), is the holder of notes of the Debtor aggregating with accrued interest to January 1, 1939, the effective date of the plan of reorganization, $49,184,905, and secured by important collateral. As a respondent on the pending petitions for certiorari herein, Reconstruction Finance Corporation is supporting the plan of reorganization for the Debtor, approved and certified to the District Court by the Interstate Commerce Commission, approved and, after the taking of a vote of the creditors, later

confirmed by the District Court and subsequently approved on appeal by the Circiut Court of Appeals for the Seventh Circuit.

In the present memorandum Reconstruction Finance Corporation desires to set forth briefly its views with respect to the motion of the Debtor, one of the petitioners for certiorari, to supplement the record in this Court, and with respect to the brief submitted in support of such motion.

I

This respondent has no objection, if it should seem desirable to the Court, to the addition to the record before this Court of such part of the papers submitted by the Debtor as contain or purport to contain statements of existing facts. Apparently the chief purpose of the additional material is to show that as the result of our national war effort the earnings of the Debtor's properties have substantially increased in the last year or two, and we are entirely willing that the Debtor should be able to show this fact for what it may be worth. We are confident, however, that, in accordance with the repeated conclusions of the Interstate Commerce Commission and the lower courts referred to in our brief and argument in the *Western Pacific* and *Milwaukee* cases now pending in this Court (Nos. 7, 8, 20, 33 and 61 and Nos. 11–19, 32, respectively), this Court will feel that such temporary earnings afford no sound basis upon which to build a

permanent capitalization for the reorganized company.

We do not, however, take the position that permission thus to supplement the record is to be granted freely or as a matter of right. It is of some significance that the cases cited by the Debtor are all cases in which the trial court or administrative tribunal did not at the time of its decision or the effective date thereof have before it an up-to-date record. The ready addition of subsequent data would lead to interminable controversies and attempted trials *de novo* before the appellate courts. Particularly is this true in railroad reorganizations, where because of the lengthy proceedings involved and the extent to which the railroads are bound up with our national economy some change in the factors involved can always be alleged.

The material proposed by the Debtor to be incorporated in the record falls into three classes: (i) documents (Appendix A to the Debtor's motion) filed in the District Court subsequent to the appeals and constituting a part of the record in that court in these proceedings but not on the appeals, (ii) data (part of Appendix B to the Debtor's motion) not constituting any part of the record in these proceedings but purporting to state existing facts and (iii) additional data (the remainder of Appendix B to the Debtor's motion) not now constituting any part of the record in

these proceedings and purporting to set out the estimates or judgment of the comptroller of the Debtor as to what certain future facts will prove to be. As stated above, if this Court in its discretion should deem it desirable we have no objection to the inclusion in the record of the additional material of class (i), or even to that falling within class (ii). We do object, however, to the attempted inclusion in the record before this Court of that part of the Debtor's proposed material falling within class (iii), being estimates or predictions not now a part of the record as to what will happen in the future.

II

We desire also to comment briefly upon the Debtor's suggestion, not made a part of its motion but appearing for the first time in the brief in support of the motion, that "in the event it [this Court] should conclude that the judgment of the Circuit Court of Appeals should be affirmed by this Court without argument, the order of this Court expressly state that such action is taken without prejudice to the presentation to the District Court of a petition for an order directing the Trustee of the Debtor's estate to pay the principal and interest of the claim of the Reconstruction Finance Corporation" (brief p. 7).

As a lending institution Reconstruction Finance Corporation is of course interested in the payment of the loans which it has made. As the most de-

sirable method of securing such payment, both in its own interest and in the interest of the Debtor and its other security holders, Reconstruction Finance Corporation is supporting without reservation the plan which has been approved by the Interstate Commerce Commission, by the District Court, and by the Circuit Court of Appeals, and is in accord with the disposition of its claims against the Debtor under that plan. Even more fundamentally, both as a creditor of the Debtor and as a public corporation interested in general railroad rehabilitation and in the national economy as a whole, Reconstruction Finance Corporation is desirous of seeing the reorganization of the Debtor completed at the earliest possible date. The plan of reorganization approved and confirmed as above mentioned affords solid hope of such early consummation, which might otherwise be delayed for a number of years.[1] Accordingly Reconstruction Finance Corporation is not asking for the payment of that claim in cash at this time.

It is also to be borne in mind that the plan in the present case has not only been approved by the District Court, but after the taking of a vote of the creditors has been confirmed by the District Court and that both these actions of the court below were

[1] In this connection, it is our understanding that the Life Insurance Group and Mutual Savings Bank Group are filing an answer to the motion of the Debtor in which it is contended that payment of the Reconstruction Finance Corporation claim would leave insufficient cash for the operation of the Dector's railroad and the consummation of the plan.

affirmed by the Circuit Court of Appeals. Section 77 (f) of the Bankruptcy Act (11 U. S. C. § 205) provides that "upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it." In view of the status of the present case, therefore, it would be wholly illogical for this Court to include in an order of affirmance a provision suggesting the treatment of the claim of any particular creditor or class of creditors in a manner different from that provided in the approved and confirmed plan.

Under these circumstances the extended discussion of the claim of Reconstruction Finance Corporation by the Debtor in the brief in support of its motion is perhaps to be regarded as a basis for a contention, in the possible event of a later hearing on the merits, that an excessive amount of new securities has been in some way allocated to Reconstruction Finance Corporation under the plan.[2]

[2] In a similar light must be viewed the suggestion of the Debtor (brief p. 6) that the Debtor's assets on October 31, 1942, were greater than on February 29, 1940, by $53,361,041, of which $47,458,147.44 constituted an increase in current as-

The contention of the Debtor is sought to be supported by a computation in which it (i) treats the approximately 232,000 shares of new common stock without par value allocated to Reconstruction Finance Corporation as actually worth $100 per share, as well as treating the income bonds and preferred stock so allocated as worth par, and (ii) adds into "the grand total of securities" stated to be allocated to Reconstruction Finance Corporation *both* $25,000,000 principal amount of 15 year secured notes *and* $49,883,800 (face amount) of collateral to be pledged to secure such notes. A sufficient answer was given by the District Court, in approving the carefully considered treatment of Reconstruction Finance Corporation's claim by the Interstate Commerce Commission, to an identical contention made before it: "The treatment of the Reconstruction Finance Corporation proves noth-

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sets, particularly cash, and that "it follows that the maximum capitalization provided for in the plan of reorganization should be increased at least by the increase in assets of $53,361,041." Naturally, barring a rehabilitation or improvement program by which the increase is sometimes expended, the assets, and particularly the cash or other current assets, of a railroad debtor in reorganization will tend to increase, for the simple reason that the debtor is not paying its bond interest and other indebtedness. Examination of Appendix C to the Debtor's own brief in support of its motion will show (sheet 2, line 43) that total corporate surplus on February 29, 1940, was a debit item of $43,363,193.55 and on October 31, 1942, a debit item of $46,770,135.89. In other words, by whatever amount assets had increased during this period, liabilities had increased by an amount approximately $3,400,000 greater.

ing whatsoever as to the value of the new securities except that the Commission believes that the new securities allotted to the Reconstruction Finance Corporation could not be liquidated for an amount in excess of the Reconstruction Finance Corporation claim" (35 F. Supp. 230, 243; R. 5022–5023). The Circuit Court of Appeals, in affirming the decision of the District Court, stated with reference to the treatment of Reconstruction's claim: "Our conclusion is that there was discrimination here, but it was against, rather than in favor of the R. F. C. It is the R. F. C. which has legitimate grounds for complaint" (126 F. (2d) 351, 369).

In this connection also the Debtor (brief pp. 10–12) attempts to convert an action of the Board of Directors of Reconstruction Finance Corporation, expressly conditioned upon the present plan of reorganization being finally confirmed and upon a request by the reorganization managers or the reorganized company, into an agreement at all times and under all circumstances to accept less than the actual full amount of Reconstruction's claim. As appears upon its face, the action referred to was taken in the hope of facilitating the early consummation of the proposed plan of reorganization of the Debtor then already approved by the Commission. Should that hope be frustrated all parties, including Reconstruction Finance Corporation, are entitled to their full original rights. And surely the Debtor of all parties is in no position to contend

that Reconstruction Finance Corporation is not entitled to the interest which the Debtor itself promised to pay when the money was borrowed. As stated at the outset of this memorandum the correct amount of the secured claim of Reconstruction Finance Corporation, with interest to the effective date of the plan (January 1, 1939), is $49,184,905.

III

Wherefore, Reconstruction Finance Corporation states that in the event such inclusion should in the judgment of this Court be desirable it has no objection to the inclusion in the record of such of the material submitted by the Debtor as contains or purports to contain statements of existing fact, but submits that except to the extent just stated the motion of the Debtor should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
JAMES L. HOMIRE,
Special Counsel,
EMMET MCCAFFERY,
Counsel,
Reconstruction Finance Corporation.

JANUARY 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1942

JAN 8 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NOS. 62, 63 AND 64

IN THE MATTER

OF

THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

IRVING TRUST COMPANY, as Successor Trustee under the First Mortgage of Milwaukee and State Line Railway Company,

Petitioner,

against

MUTUAL SAVINGS BANK GROUP COMMITTEE, LIFE INSURANCE GROUP COMMITTEE, *et al.*,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

HAROLD C. MCCOLLOM,
Attorney for Petitioner,
One Wall Street,
New York, New York.

Dated: New York, January 7, 1943.

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-2343

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1942

Nos. 62, 63 and 64

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SUPPLEMENTAL MEMORANDUM FOR PETITIONER

In view of the motion and briefs which have been filed recently in Nos. 34, 35 and 36, Irving Trust Company, as Trustee under the First Mortgage of Milwaukee and State

Line Railway Company, petitioner in Nos. 62, 63 and 64 (hereinafter called the State Line Trustee), deems it advisable to file this supplemental memorandum.

Nos. 34, 35 and 36, wherein Chicago and North Western Railway Company, Debtor, is petitioner, involve some of the same orders which are involved in the State Line Trustee's petition, Nos. 62, 63 and 64; and both petitions are based on the same printed record.

The State Line Trustee takes no position with respect to the motion made by the petitioner in Nos. 34, 35 and 36, to supplement the record.

Our purpose in this memorandum is to call the Court's attention to the fact that different issues are involved in the State Line Trustee's petition from those raised by the Debtor's petition; and that, even if this Court should grant the request in the brief of the Group Committees, dated December 29, 1942, that the petition for certiorari in Nos. 34, 35 and 36 be denied, the petition of the State Line Trustee still requires separate action and consideration.

The nature of the issues in the State Line Trustee's petition and their lack of any similarity to those presented by the Debtor's petition, or by the cases under Section 77 which the Court now has under advisement, appears from the statement of the main question contained in the State Line Trustee's petition (pp. 18-19), as follows:

> "Where divisional bondholders, secured by a first lien on a specific part of the Debtor's property, do not cast the requisite two-thirds vote in favor of the plan of reorganization, and the appellate judges 'confess to the existence of a doubt' as to the fairness of the treatment accorded to such bondholders by the Plan, was the appellate court justified in holding that the rejection of the Plan

by the divisional bondholders 'is not reasonably justified in the light of the rights and interests of those rejecting it and all the relevant facts' (Bankruptcy Act, Section 77e) because

(a) all other classes of creditors have approved the Plan, and

(b) the Plan benefits all the creditors 'considering them together', and

(c) the divisional bondholders would allegedly be benefited by the greater marketability of and more certain interest payments on their new securities if the Plan should be consummated?''

The other questions relating to Section 77 of the Bankruptcy Act, which are referred to in the State Line Trustee's petition (pp. 19-22), refer to three general subject-matters:

(1) The Court's preliminary determination of the fairness of the Plan for submission to the creditors, with particular reference to the rules applicable to a divisional mortgage;

(2) The State Line Trustee's claim to the net income of the mortgaged property; and

(3) The Court's confirmation of the Plan after it had failed of acceptance by the State Line bondholders.

Petitioner submits that, irrespective of this Court's decision upon the motion to supplement the record in Nos. 34, 35 and 36 and upon the petitions for certiorari therein, and regardless of what disposition this Court may make of the pending cases relating to the *Western Pacific* and *Milwaukee* railroad reorganizations, the petition of the

State Line Trustee raises other important questions of Federal law which should be decided by this Court, and that the petition for certiorari in Nos. 62, 63 and 64 should be granted.

Dated: New York, January 7, 1943.

HAROLD C. MCCOLLOM,
Attorney for Irving Trust Company, as Successor Trustee under the First Mortgage of the Milwaukee and State Line Railway Company.

ORRIN G. JUDD,
Of Counsel.

FILED
FEB 24 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

Petitioner,

vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

MOTION FURTHER TO SUPPLEMENT RECORD.

HELEN W. MUNSERT,
LUTHER M. WALTER,
Attorneys for Chicago and North Western Railway Company, Debtor, Petitioner.

February 23, 1943.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

Nos. 34-35-36.

In the Matter of

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

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CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Debtor,

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vs.

MUTUAL SAVINGS BANK GROUP COMMITTEE, et al.,

Respondents.

MOTION FURTHER TO SUPPLEMENT RECORD.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The undersigned counsel for the Chicago and North Western Railway Company, Debtor, petitioner in the above-entitled cases, respectfully make the following motion on behalf of said petitioner:

That a certified copy of the balance sheet stating assets and liabilities of the Debtor, Chicago and North Western

Railway Company, as of December 31, 1942, and of the income account, stating revenues and expenses of said Debtor for the calendar year 1942, as filed with and certified by the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, the said balance sheet and said income account respectively having been filed therein by Charles M. Thomson, Trustee of said Debtor's estate on February 13 and February 20, 1943, be made part of the record in these proceedings to be considered in connection with said Debtor's petition for writs of certiorari in these proceedings. A copy of said balance sheet of the Debtor as of December 31, 1942, is attached as Appendix A hereto; a copy of the income account for the calendar year 1942 is attached hereto as Appendix B.

HELEN W. MUNSERT,

LUTHER M. WALTER,

Attorneys for Chicago and North Western Railway Company, Debtor,

Petitioner.

Dated at Chicago, Illinois,
February 23, 1943.